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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

INTERSTATE BRANDS CORPORATION,
Petitioner,
v.
ROBERT B. REICH, Secretary of Labor,
United States Department of Labor,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF BAKERY, CONFECTIONERY AND TOBACCO WORKERS INTERNATIONAL UNION OF AMERICA, AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
OPINIONS BELOW, JURISDICTION, STATUTE INVOLVED AND STATEMENT OF THE CASE	3
ARGUMENT	3
I. THE DECISION OF THE SEVENTH CIRCUIT THREATENS TO DISRUPT LABOR RELATIONS PEACE THAT BOTH LABOR AND MANAGEMENT WORKED HARD TO BRING ABOUT	3
II. THE DECISION OF THE SEVENTH CIRCUIT INTERFERES WITH TWO MAJOR PRINCIPLES OF COLLECTIVE BARGAINING EVIDENT IN THE INTENT OF THE FAIR LABOR STANDARDS ACT	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases — Page

149 Madison Avenue Corp. v. Asselta, 331 U.S. 199 (1947), *mod. on other grounds*, 331 U.S. 795 (1947) 6

Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) 6

Minizza v. Stone Container Corp., 842 F.2d 1456 (3d Cir.), *cert. denied*, 488 U.S. 929 (1988) 6

Statutes

29 U.S.C. § 202 6

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The Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO ("BCTW" or "Union") respectfully submits this *amicus curiae* brief in support of petitioner, Interstate Brands Corporation. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

INTEREST OF *AMICUS CURIAE*

The BCTW represents the great majority of production employees employed in the wholesale baking industry—in over 220 wholesale bakeries, which employ approximately 30,000 employees nationwide. Moreover, the

BCTW was the labor organization that negotiated the earned work credit system at issue in this case as the linchpin of a national strike settlement reached with the baking industry in 1972.

The earned work credit arrangement resolved a long, disruptive dispute between employees and employers that was inherent in the peculiar market circumstances of this industry. The solution negotiated was a system of penalty accruals that, at one and the same time, continued to permit employers to schedule employees for non-consecutive work days while it also deterred them from doing so except where necessary. Thus, the system gives employers an incentive to provide employees the normal two consecutive days off per week to the maximum extent possible, given the production demands of the industry.

This penalty-incentive system had worked well to everyone's satisfaction for twenty years, and it had enjoyed the tacit acceptance of the Deartment of Labor until that agency, in this litigation, suddenly and without any justification reversed its enforcement practice of two decades, and determined that earned work credit payments must be included in employees' regular rate of pay for the purpose of calculating overtime payments.

Because the Department's precipitous policy change threatens to undo twenty years of labor relations stability on a sensitive issue, the BCTW has a substantial interest in the outcome of this litigation. Moreover, it is the only party-in-interest which can fully convey the unique perspective of the employees concerning the detrimental impact of the Seventh Circuit's decision for which review is sought here. As the recognized representative of those employees, the BCTW wishes to stress that the incentive and deterrence intended in and provided by the earned work credit system have worked to reduce the incidence of non-consecutive weekly days off and have thereby made a valuable contribution to labor peace. This era of tranquility is now in jeopardy as a result of the Depart-

ment's misplaced intervention, sanctioned by the Seventh Circuit, into a field of private labor-management creativity Congress intended to remain sacrosanct in the Fair Labor Standards Act ("FLSA"). The BCTW, therefore, advocates review of this decision in order to secure bargaining freedom and to protect the responsible labor relations stability of this important national industry.

OPINIONS BELOW, JURISDICTION, STATUTE INVOLVED AND STATEMENT OF THE CASE

The BCTW adopts Petitioner's statement and description of the opinions below, jurisdiction, statute involved, and statement of the case.

ARGUMENT

I. THE DECISION OF THE SEVENTH CIRCUIT THREATENS TO DISRUPT LABOR RELATIONS PEACE THAT BOTH LABOR AND MANAGEMENT WORKED HARD TO BRING ABOUT.

The earned work credit system has contributed to the maintenance of labor peace in the national baking industry for over 20 years. The key to its success is that it is directed at employer assignment practices in a way that simultaneously addresses both employee and employer needs—it retains for employers the discretion to schedule non-consecutive workweeks while providing to employees the assurance that such schedules will only be assigned when absolutely necessary. This result is accomplished by the imposition of a direct cost on the employer when such an assignment is made.

Baking employees traditionally worked non-consecutive-day weeks, with industry employers having—and using—the absolute discretion to schedule such workweeks. The erratic scheduling of days off under this arrangement caused great dissatisfaction among bakery employees. Under this setup, employees were deprived of an important work feature the majority of the country receives and

anticipates: a two-day-block of free time, which enhances the quality of time off. As in most industries, baking industry employees wanted two consecutive days off as time for additional rest and relaxation, as well as time for recreational activities that do not condense easily into one day off, especially those that would involve going away from home. Therefore, the BCTW began insisting upon a Monday to Friday work schedule for its members.

The employers were intractable. They resisted any guarantee of a consecutive-day workweek. Both sides bargained over the issue intensely and eventually reached impasse. The employees wanted a guarantee of a Monday to Friday consecutive workweek; the employers insisted on retention of absolute discretion to schedule non-consecutive day workweeks. A series of major, nationwide strikes resulted in 1972.

To settle those strikes, get workers back to work and revive production, a practical compromise was reached. The solution—the earned work credit system—was the closest approximation to a consecutive-day guarantee that the Union was able to achieve. The system is a monetary incentive-deterrent on employers to schedule, whenever possible, consecutive-day workweeks. Thus, the earned work credit system was created as a limitation on employer discretion. The system monetarily penalizes the employer whenever a non-consecutive-day workweek is scheduled, thus deterring it from assigning such schedules unless unavoidable, and it encourages the employer to schedule the desired, five-consecutive-day assignment.

The earned work credit has no relationship to hours actually worked by any individual employee. Moreover, the payment received by employees eligible at the time of deferred distribution is modest on an individual basis, and in comparison to the real hourly wage. It has its deterrent-incentive effect in the aggregate, because the total sum of such individual amounts must be borne by the employer. In that way, the earned work credit was

the inducement the baking industry employees received to sign the contract and end the strike. It has operated to the satisfaction of all interested parties and has successfully contributed to labor peace in the baking industry for over 20 years.

The nullification of the earned work credit system, which has effectively occurred as a result of the Seventh Circuit's decision, unsettles the stability of the entire baking industry on a highly contentious issue. The decision has put the parties back in the unsettled state that prompted the strike almost 25 years ago. In fact, as the BCTW noted in a letter contained in the record below, the decision has already begun to cause confrontation at the bargaining table with baking industry employers, as both labor and management attempt to address the potential future ramifications.

In threatening to disrupt hard-won labor peace, and in sweeping aside a creative solution to a difficult problem, the Seventh Circuit's decision leaves baking industry employees with no foreseeable solution. The BCTW thus asks this Court to reaffirm its strong commitment to labor peace and free collective bargaining by granting the petition for certiorari and reversing the decision below.

II. THE DECISION OF THE SEVENTH CIRCUIT INTERFERES WITH TWO MAJOR PRINCIPLES OF COLLECTIVE BARGAINING EVIDENT IN THE INTENT OF THE FAIR LABOR STANDARDS ACT.

Freedom and flexibility in collective bargaining are two of the most important principles of the national labor policy, and they are recognized in the FLSA as well. Those principles benefit labor and management alike and allow unions to achieve significant advances in employment conditions for their members. The Seventh Circuit's decision disregards those long-established principles, and thus it tends to deny unions the right and the means to obtain the best possible agreements on behalf of their members.

The principle of free collective bargaining is the cornerstone of the national labor policy and of all labor statutes, including the FLSA. Indeed, Congress stated in Section Two of the FLSA itself that the policy of the Act was to eliminate

> labor conditions [which] burden[] commerce and the free flow of goods in commerce [and] lead[] to labor disputes burdening and obstructing commerce and the free flow of goods in commerce . . . as rapidly as practicable . . . without substantially curtailing employment or earning power.

29 U.S.C. § 202. Moreover, the legislative history of the FLSA indicates that

> *the prime purpose* of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.

Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945) (emphasis added).

The other important foundation to the national labor policy, as well as to the FLSA in particular, is the flexibility available to management and labor to reach creative and innovative solutions to atypical problems. This Court has held that "[i]t was not the purpose of Congress in enacting the Fair Labor Standards Act to impose upon the almost infinite variety of employment situations a single, rigid form of wage agreement." *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 203-04 (1947), *mod. on other grounds*, 331 U.S. 795 (1947). Thus, this Court has recognized that management and labor often face unique problems that are not amenable to wooden application of the FLSA, and that Congress never intended for such mechanical application to occur. As the Third Circuit in *Minizza v. Stone Container Corp.*, 842 F.2d 1456, 1463 (3d Cir.), *cert. denied*, 488 U.S. 929 (1988), correctly stated:

> The FLSA was not intended to emasculate the ability of labor and management to be creative in resolving labor disputes in a manner which is mutually beneficial from an economic standpoint to all parties involved in such negotiations. The FLSA should not be used . . . as an impediment to creative and innovative collective bargaining which brings labor peace.

The earned work credit system was viewed by all parties involved, both labor and management together, as just that—a creative and innovative collectively-bargained solution which achieved labor peace. The BCTW was thus effectuating the intent of Congress evident in the FLSA in negotiating the earned work credit system, by bringing stability and labor peace to the baking industry through the efforts of free and flexible collective bargaining. Freedom and flexibility in collective bargaining are important to unions in achieving significant and beneficial advances for workers; indeed, the earned work credit system was a product of such organized labor power. Therefore, blind and rigid application of the general rules concerning the regular rate and overtime provisions of the FLSA defeats the statute's purposes in this case. Labor will now be constrained in reaching the best possible agreements on behalf of the membership, in direct contradiction to the purposes and goals of the FLSA.

While the BCTW recognizes the important objectives of the Department of Labor and the Seventh Circuit in enforcing the FLSA, the artificial application of FLSA language in this case impedes achievement of the fundamental FLSA goals. Here, the Seventh Circuit's application of the FLSA is a hinderance, not an aid, to the employees it seeks to protect.

CONCLUSION

For all the reasons stated above, BCTW urges this Court to grant the petition for writ of certiorari and reverse the decision below, thereby reaffirming the importance of the FLSA's statutory objectives of fostering labor peace and preserving the freedom and flexibility of collective bargaining.

Respectfully submitted,

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